

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WAYNE W. PRATT)
Claimant)
)
VS.)
)
STEVE'S PRECISION DENTAL LAB, INC.)
Respondent)
)
AND)
)
HARTFORD UNDERWRITERS INS. CO.)
Insurance Carrier)

Docket No. **1,038,005**

ORDER

Claimant requests review of the October 1, 2009 Award by Administrative Law Judge Marcia L. Yates Roberts. The Board heard oral argument on January 20, 2010.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for the claimant. Tracy M. Vetter of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The parties stipulated Wayne W. Pratt suffered accidental injury arising out of and in the course of his employment when his vehicle was rear-ended while he was stopped at an intersection. The parties were unable to agree upon the nature and extent of disability Pratt suffered as a result of that accident. The Administrative Law Judge (ALJ) awarded Pratt compensation for a 66.5 percent work disability based upon a 33 percent task loss and a 100 percent wage loss.

Pratt requested review and argues that he suffers permanent total disability. Respondent argues Pratt should be limited to his functional impairment or, in the alternative, the ALJ's Award should be affirmed.

The sole issue raised on review before the Board is the nature and extent of Pratt's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Pratt was hired as a part-time delivery driver for respondent, a dental lab. He earned \$8 an hour and worked anywhere from 8 to 24 hours a week. Pratt would deliver dental products to dentists and also occasionally pack the dental products in boxes.

On August 20, 2007, Pratt was driving respondent's vehicle returning from a delivery. While stopped at a red light he was rear ended by a van. Pratt injured his neck, back, legs, and head. He was transported by ambulance to the VA's emergency room in Kansas City, Missouri. X-rays were taken and medications were prescribed. Pratt was released to his doctor at the VA in Leavenworth, Kansas.

The respondent eventually sent Pratt for treatment at the Dickson-Diveley Midwest Orthopaedic Clinic. Drs. Thomas Shriwise and Lan Fotopoulos provided treatment. Upon physical examination, Dr. Shriwise diagnosed Pratt as having an exacerbation of arthritis in his neck. The doctor prescribed anti-inflammatory medication and also cervical nerve root blocks which were given to Pratt by Dr. Fotopolous. The series of injections only gave Pratt temporary relief so Dr. Fotopolous recommended radio frequency ablation which Pratt declined.

When released by Dr. Shriwise in May 2008, it was recommended that Pratt return to the VA in Leavenworth, Kansas, for management of his arthritic condition. Consequently, Pratt sought additional treatment at the VA which consisted of MRI's as well as medications including Hydrocodone, Flexeril, Gabapentin, Synvostat and Vardenephil.

Pratt testified he continues to have problems with neck and back pain, dizziness, headaches, vision problems and pain into his legs. And his pain has gotten worse since the accident. He does not sleep much because of the pain and so he sleeps for short periods of time during the night and day. Pratt further noted that because of the narcotic medication he is taking he does not feel he should drive. And when he needs to drive he will not take his medication. Pratt concluded that he does not know any job he could now perform as he can hardly care for himself.

At the time of the accident Pratt was also working a second part-time job in Kansas City at the Jackson County Detention Center as a commissary distribution clerk two nights a week. He further testified that he is no longer able to perform that job.

Pratt had suffered a work-related injury to his right arm and elbow in 1992 while working for Union Pacific Railroad. Ultimately, in 1997, he was not able to continue working and received a lump sum disability settlement with a monthly stipend from the railroad. In order to continue to receive the monthly stipend, Pratt cannot earn more than \$730 a month.

On cross-examination, Pratt testified that he was aware that respondent had offered him an accommodated position after he was released from treatment by Dr. Shriwise. Pratt testified that on the day he was supposed to go in to work he was not feeling good because he was in pain and just could not attempt the job.

Dr. Shriwise, board certified orthopedic surgeon, examined and evaluated Pratt on October 11, 2007, and did some follow-up visits. Upon physical examination, Dr. Shriwise diagnosed Pratt as having an exacerbation of arthritis in his neck. The doctor prescribed anti-inflammatory medication and also cervical nerve root blocks which were given to Pratt by Dr. Fotopolous. The series of injections only gave Pratt temporary relief so Dr. Fotopolous recommended radio frequency ablation. Ultimately, Dr. Shriwise placed permanent restrictions on Pratt of no lifting greater than 5 pounds to waist, no lifting greater than 15 pounds to chest and no lifting greater than 5 pounds overhead as well as no stop and go driving. Finally, the doctor concluded Pratt should alternate sitting and standing as needed for pain control. Dr. Shriwise explained that he did not restrict Pratt from highway driving but did restrict him from stop and go city driving which he quantified as an hour in the morning and an hour in the afternoon. Dr. Shriwise rated Pratt's neck and back at 5 percent but noted that some of the impairment rating is preexisting. Dr. Shriwise opined that Pratt was still employable.

Dr. Shriwise testified that Pratt's condition would be certainly exacerbated by city driving due to stop and go as well as frequent lane changes.

Q. Is there a time frame you can put on, like if he had a potential job that required him once or twice a day to get in a car and go drive somewhere, is there a way to quantify how many times he can drive during an 8-hour workday or city versus highway driving?

A. Yes there is, to some extent. I think a morning trip and an afternoon trip would be within reason. But all day long would possibly be too irritating for him to do on a day-to-day basis.

Q. So no constant driving in the city day-to-day?

A. Right.

Q. Is there any other way to clarify what you mean by no city driving beyond that or more specifically?

A. This really gets into the judgment gray area of things. But I would think no more than two to three hours per day, an hour or a little more in the morning and an hour in the afternoon on a day-to-day basis would be tolerable. But much more than that on a day-to-day basis would probably be too irritating for his underlying condition.¹

Dr. Shriwise opined that Pratt is disabled from his neck more than his back. He further opined that 50 percent of his neck disability is due to the motor vehicle accident. After reviewing the task list provided by Mr. Michael Dreiling, the doctor opined Pratt was capable of performing 5 out of 6. Dr. Shriwise further opined that Pratt is capable of performing work in the open labor market.

Dr. James Stuckmeyer, a board certified orthopedic surgeon, performed an independent medical evaluation of Pratt on June 25, 2008 at the request of Pratt's attorney. Pratt gave a history of an injury to his cervical spine and low back as a result of a motor vehicle accident while he was working for respondent. He complained of ongoing symptoms of chronic neck pain; painful range of motion; persistent pain in the low back; a pinching sensation in the lumbar spine; headaches with frequent bouts of dizziness and poor balance; ringing in his ear; difficulty with prolonged standing, walking, lifting, and bending; difficulty sleeping and symptoms of sexual dysfunction. After examining Pratt, Dr. Stuckmeyer diagnosed him with an injury to his cervical spine with ongoing symptoms of posterior myofascial syndrome, chronic cervical strain and sprain with radicular complaints, and low back pain with bilateral radicular complaints. He opined that Pratt's work-related accident was the direct and proximate cause of his cervical and lumbar complaints. Dr. Stuckmeyer stated that Pratt had preexisting degenerative changes in his low back which were aggravated by his accident.

Based on the *AMA Guides*², Dr. Stuckmeyer rated Pratt as having a 20 percent permanent partial impairment to his cervical spine. For Pratt's ongoing symptoms of low back pain and aggravation of preexisting degenerative condition, Dr. Stuckmeyer assessed Pratt's permanent partial impairment at 15 percent.

Dr. Stuckmeyer recommended that Pratt have restrictions of no prolonged standing, walking, lifting, or bending; he should not lift greater than 5 to 10 pounds on an occasional basis; and he should be allowed to alternate sitting and standing as needed. Because of Pratt's use of narcotic medication, he should not be driving or be around dangerous machinery. Pratt should do no repetitive bending at the waist, with no repetitive torsional

¹ Shriwise Depo. at 8-9.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

stresses, and he should avoid repetitive cervical motion. With regard to employability, Dr. Stuckmeyer deferred to vocational experts. Dr. Stuckmeyer reviewed the task list prepared by Michael Dreiling. Of the 6 tasks on the list, Dr. Stuckmeyer opined Pratt was unable to perform 5 for an 83 percent task loss.

Michael Dreiling, a vocational consultant, interviewed Pratt on December 1, 2008, at the request of Pratt's attorney. Together they prepared a list of six tasks Pratt performed in the 15-year period before his accident of August 20, 2007. Mr. Dreiling noted that Pratt had completed the 11th grade and later acquired his GED. He took courses at Kansas City, Kansas, Community College but did not complete a degree. He has no typing or computer skills. Mr. Dreiling opined that Pratt's lack of any further formal academic or vocational training would significantly limit his employability. His work history is performing mostly physically oriented work. He does not have any significant transferable job skills.

Pratt underwent vocational testing given by Mr. Dreiling. Mr. Dreiling's report indicates that the results of the vocational testing were not consistent with Pratt's successfully completing college-level courses. But the results are consistent with Pratt's work history. Mr. Dreiling opined that Pratt is not a candidate for any type of formal training program. It is Mr. Dreiling's vocational opinion that Pratt is essentially and realistically unemployable in the open labor market, and no employer would reasonably be expected to employ Pratt in his existing physical condition.

Terry Cordray, a certified rehabilitation counselor, interviewed and tested Pratt on February 13, 2009, at the request of respondent's attorney. He prepared a list of 18 tasks Pratt had performed in the 15-year period before his accident in August 2007. Mr. Cordray believed that Pratt retained the ability to return to the same types of jobs he had previously been doing on a part-time basis. He noted Pratt retained the ability to work delivering vehicles for rental car agencies, pushing a cart with canteen items for inmates at a jail, working as a cashier at a convenience store or parking garage, and working as small auto parts delivery person or small dental product delivery person. He believes Pratt is employable in the open labor market. Accordingly, he did not believe Pratt was permanently, totally disabled.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴

³ K.S.A. 2008 Supp. 44-501(a).

⁴ K.S.A. 2008 Supp. 44-508(g).

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.⁵

Although Dr. Shriwise offered an opinion regarding Pratt's functional impairment, the doctor did not establish that he based his rating upon the *AMA Guides*. Conversely, Dr. Stuckmeyer based his ratings upon the *AMA Guides*. Consequently, the Board affirms the ALJ's finding adopting Dr. Stuckmeyer's opinion that Pratt suffered a 20 percent whole person functional impairment to his cervical spine and a 15 percent whole person functional impairment to his lumbar spine. Using the combined value chart in the *AMA Guides* the Board finds Pratt suffered a 32 percent whole person functional impairment.

Claimant argues that as a result of the accidental injury he now suffers a permanent and total disability.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁶

In *Wardlow*⁷, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his

⁵ K.S.A. 44-510e(a).

⁶ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁷ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

Dr. Stuckmeyer noted that Pratt's use of narcotic medications limited him from driving and working around machinery. Dr. Shriwise agreed that Pratt should not have a job driving while on narcotic medication. And Dr. Stuckmeyer deferred to the vocational experts regarding Pratt's employability. Mr. Dreiling concluded Pratt was essentially and realistically unemployable. Mr. Cordray primarily focused on Pratt's ability to perform part-time delivery driver jobs but both doctors indicated Pratt should no drive while taking narcotic medication.

Much like *Wardlow*, Pratt suffered injuries to his cervical and lumbar spine that left him permanently physically impaired. His restrictions limited the physical activities he could perform, he lacks transferrable skills, he is in constant pain and must change body positions, he has an inability to sleep through the night which requires that he sleep during the day and his use of narcotic medication to control his pain corroborates Mr. Dreiling's opinion that Pratt suffers permanent and total disability.

Respondent argues that before the accident Pratt was limited to part-time work as a result of his injury working for the railroad. Respondent further argues that such part-time work was not substantial and gainful employment. Consequently, respondent finally argues that Pratt was already permanently and totally disabled before this accident and in any event he can still perform such temporary work. The Board disagrees. While Pratt limited his work to part-time employment after the railroad accident it was apparently an economic decision as he did not have medical restrictions that prevented him from substantial gainful employment. Stated another way, Pratt was underemployed but it was not because of physical limitations. However, after the instant accident Pratt is essentially and realistically unemployable especially due to the use of narcotic medication he takes to control his pain.

Pratt's condition is directly traceable to his work-related injury. His physical limitations lead the Board to the conclude that he is essentially and realistically unemployable and thus incapable of substantial and gainful employment. It is the Board's determination that Pratt has met his burden of proof to establish that he is permanently and totally disabled. Consequently, the ALJ's Award is modified to reflect Pratt is entitled to an award of permanent total disability.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Marcia L. Yates Roberts dated October 1, 2009, is modified to reflect that Pratt suffers a permanent total disability.

Claimant is entitled to 38.43 weeks temporary total disability compensation at the rate of \$91.40 per week or \$3,512.50 followed by permanent total disability compensation

at the rate of \$91.40 per week not to exceed \$125,000 for a permanent total general body disability.

As of March 26, 2010, there would be due and owing to the claimant 38.43 weeks of temporary total disability compensation at the rate of \$91.40 per week in the sum of \$3,512.50 plus 97.14 weeks of permanent total disability compensation at the rate of \$91.40 per week in the sum of \$8,878.60 for a total due and owing of \$12,391.10, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$112,608.90 shall be paid at \$91.40 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of March 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Tracy M. Vetter, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge